R. G. Burns Electric, Inc. *and* International Brotherhood of Electrical Workers, Local 840. Case 3-CA-18261

August 27, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND LIEBMAN

On November 29, 1995, Administrative Law Judge Jesse Kleiman issued the attached decision. The Respondent filed exceptions, a supporting brief, and a request for oral argument, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record[1] in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified and set forth in full below.[3]

The judge found that the Respondent violated Section 8(a)(3) and (1) by refusing to hire eight journeyman electricians because of their Union affiliation. The Respondent excepts, contending, inter alia, that the allegations of discrimination are time barred by Section 10(b) of the Act.[4] The Respondent argues that because Union Assistant Business Agent Ray McDermott admitted that he had suspicions as early as February 1993,[5] following the electricians' applications for employment the prior November, that the Respondent was refusing to hire Union-affiliated electricians, McDermott's knowledge of the Respondent's unfair labor practices preceded the 10(b) period relevant to the charge filed November 26. Therefore, the Respondent argues that the allegations and the charge are time barred.

We agree with the judge's findings and conclusion that the allegations are not time barred and, for the following reasons, we find no merit to the Respondent's exceptions.[6]

McDermott's testimony was that he "strongly suspected" as of February 1 that the Respondent had hired electricians and believed by that summer that the union applicants would not be hired. The judge found that McDermott first documented in his log, on May 26, that he saw a new man working for the Respondent and, although the Union was aware of other individuals, McDermott did not know if this particular person or the others he had observed were new employees or simply transferred from another of the Respondent's projects. Knowledge of such facts would not necessarily give the Union clear and unequivocal notice, however, that the Respondent had rejected the union applicants and had hired nonunion employees from outside its own employee roster, into the jobs for which the union applicants had applied. The Respondent had never expressly denied the discriminatees employment, but rather gave them assurances that they did not need to file new applications because it was the Respondent's policy to retain all applications for 2 years. Thus, the Respondent's implementation of an unlawful hiring policy was not clear even after new faces—individuals unknown to the union—appeared on the Respondent's worksite.[7]

As the judge correctly found, the November 26 charge would be timely even if the Union had the requisite clear and unequivocal notice of the unfair labor practice by May 26. In order to avoid establishing a misleading precedent, however, we make the additional finding that the Union did not in fact have such notice until August 16. We find notice as of that date on the basis of McDermott's admission that on August 16, in a telephone conversation with Richie McPherson, a union organizer with Local 325 in Binghamton, New York, McDermott learned that the Respondent had hired two new people, one of whom was a Paul Benkovitz from

[1] On consideration of the record, including the exceptions and briefs, the Respondent's request for oral argument is denied as the record before us adequately presents the issues and positions of the parties.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 363 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We shall modify the judge's conclusions of law, recommended Order, and notice to conform to the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) by refusing to hire the eight applicants. We note that the complaint alleged solely refusal to hire violations, the case was litigated on this theory of a violation, the judge throughout his discussion of the alleged unfair labor practices refers to the violations as refusals to hire, and the judge's recommended remedy reflects a finding of refusal to hire violations. We accordingly have deleted the judge's reference to the Respondent's refusal to consider these applicants for hire.

We shall also modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container, Inc.,* 325 NLRB 17 (1997)

Chairman Gould would find that both refusal to consider and refusal to hire theories of violation were fully litigated before the administrative law judge. Based on the evidence presented, he would adopt the judge's findings that the Respondent both refused to consider and refused to hire applicants Sherman Soles, William Snyder, Jack Francisco, Craig Andrews, Robert Ryan, Richard MacGill, and Kevin Radka. See *Casey Electric*, 313 NLRB 774 (1994). With regard to applicant Kenneth Lumb, however, the credited evidence indicated that the Respondent had contacted the Union for information regarding Lumb's qualifications. Consequently, Chairman Gould would find that the evidence did not establish a refusal to consider violation as to Lumb, but solely a refusal to hire violation.

[4] Sec. 10(b) states in pertinent part that "[N]o complaint shall issue based on any unfair labor practice occurring more than six months prior to the filing of the charge with the Board."

[5] All dates are in 1993 unless otherwise indicated.

[6] We find it unnecessary to rely, however, on the judge's application of the fraudulent concealment doctrine.

[7] *Great Lakes Chemical Corp*., 298 NLRB 6l5 fn. 2 (1990).

Binghamton who was hired on August 10. Therefore, while McDermott had "suspicions" on May 26, his knowledge of the Respondent's hiring actions first came as a result of McPherson's information on August 16, less than 4 months before the charge was filed.

We recognize that notice for the purpose of the 10(b) limitation period may be found even in the absence of actual knowledge if a charging party has failed to exercise reasonable diligence, i.e., the 10(b) period commences running when the charging party either knows of the unfair labor practice or would have "discovered" it in the exercise of "reasonable diligence." *Oregon Steel Mills,* 291 NLRB 185, 192 (1988). We agree with the judge that McDermott exercised "reasonable diligence," given his efforts to find out if in fact the people he observed at the Respondent's jobsite were new hires.

The record evidence shows that not only did McDermott keep the Respondent's worksite under frequent surveillance and document his observations, but it also reveals McDermott's efforts to find out the truth by using his inside sources at the Respondent's jobsite to provide him with the answers, although he was unsuccessful. It took a chance telephone call from McPherson, however, to provide McDermott with concrete evidence.[8]

Accordingly, we agree with the judge's conclusion that the Respondent has failed to carry its burden of showing that the Union's charge was untimely under Section 10(b).

AMENDED CONCLUSION OF LAW

Substitute the following for Conclusion of Law 3.

"3. The Respondent violated Section 8(a)(3) and (1) of the Act by refusing to employ, because of their union affiliation and activities on behalf of the Union, Sherman Soles, William Snyder, Jack Francisco, Craig Andrews, Robert Ryan, Kenneth Lumb, Richard MacGill, and Kevin Radka."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, R.G. Burns Electric, Inc., Phelps, New York, its officers, agents, successors, and assigns, shall.

1. Cease and desist from

(a) Refusing to employ Sherman Soles, William Snyder, Jack Francisco, Craig Andrews, Robert Ryan, Kenneth Lumb, Richard MacGill, and Kevin Radka because of their union application and activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Sherman Soles, William Snyder, Jack Francisco, Craig Andrews, Robert Ryan, Kenneth Lumb, Richard MacGill, and Kevin Radka employment in positions for which they applied or, if those positions no longer exist, to substantially equivalent positions.

(b) Make Sherman Soles, William Snyder, Jack Francisco, Craig Andrews, Robert Ryan, Kenneth Lumb, Richard MacGill, and Kevin Radka whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any references to the unlawful refusal to employ the eight discriminatees named above, and within 3 days thereafter notify them in writing that this has been done and that the unlawful conduct will not be used against them in any way in the future.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay and other benefits due under the terms of this Order.

(e) Mail a copy of the attached notice marked "Appendix"[9] to the last known address of Sherman Soles, William Snyder, Jack Francisco, Craig Andrews, Robert Ryan, Kenneth Lumb, Richard MacGill, and Kevin Radka. Copies of the notice on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be mailed by the Respondent immediately upon receipt thereof.

(f) Sign and return to the Regional Director for Region 3, sufficient copies of the notice for posting by the Union, if it is willing at its office and meeting halls, including all places where notices are customarily posted.

(g) Within 14 days after service by the Region, post at its Phelps, New York facility, copies of the attached no-

[8] This case is distinguishable from *Moeller Bros. Body Shop*, 306 NLRB 191 (1992). In that case, a complaint alleging noncompliance with the collective-bargaining agreement was found barred because the violations should reasonably have been discovered by the charging party union more than 6 months before the charge was filed. The Board found due diligence lacking because the alleged contractual violations were evident upon observation of the workplace and the charging party union had possessed, but never exercised, the right to appoint a shop steward. Further, its business agents had rarely visited the facility, although apparently entitled to do so.

Member Liebman agrees with her colleagues and the judge that the November 26 charge was timely even if the Union had clear and unequivocal notice of the unfair labor practice on May 26 when assistant business agent McDermott saw a "new man" working for the Respondent. Member Liebman finds it unnecessary to rely on her colleagues' additional rationale that the Union did not, in fact, have such notice until August 16 when McDermott learned that the Respondent had hired two new people.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

tice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 26, 1993.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to employ Sherman Soles, William Snyder, Jack Francisco, Craig Andrews, Robert Ryan, Kenneth Lumb, Richard MacGill, and Kevin Radka because of their union application and activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Sherman Soles, William Snyder, Jack Francisco, Craig Andrews, Robert Ryan, Kenneth Lumb, Richard MacGill, and Kevin Radka employment in positions for which they applied or, if those jobs no longer exist, to substantially equivalent positions.

WE WILL make Sherman Soles, William Snyder, Jack Francisco, Craig Andrews, Robert Ryan, Kenneth Lumb, Richard MacGill, and Kevin Radka whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any and all references to the unlawful refusal to employ the eight applicants named above**,** and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that this will not be used against them in any way in the future.

R. G. BURNS ELECTRIC, INC.

Rafael Aybar, Esq., for the General Counsel.
Luther C. Nadler, Esq., for the Respondent.
Ray McDermott, Union Representative, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JESSE KLEIMAN, Administrative Law Judge. Upon the basis of a charge filed on November 26, 1993, by International Brotherhood of Electrical Workers, Local 840 (the Union), a complaint and notice of hearing was issued on January 31, 1994, against R. G. Burns Electric, Inc. (the Respondent), alleging that the Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). By answer dated February 11, 1994, the Respondent denied the material allegations in the complaint and asserts that the unfair labor practice charge filed in this case is time barred by Section 10(b) of the Act because the events occurred more than 6 months prior to the filing of the charge with the Board and service upon the Respondent. The Respondent also maintains therein that "neither the complaint nor the amended complaint are based on the charge."

A hearing was held before me on November 2 and 3, 1994, in Rochester, New York. Subsequent to the close of the hearing, the General Counsel and the Respondent filed briefs.

On the entire record and the briefs of the parties, and upon my observation of the witnesses, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

The Respondent, at all times material, is and has been a corporation with an office and place of business in Phelps, New York engaged in operation as an electrical contractor. The Respondent annually in the conduct of its business operations purchases and receives at its various worksites and at its Phelps, New York facility goods and materials valued in excess of $50,000 directly from points outside the State of New York. I therefore find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

International Brotherhood of Electrical Workers, Local 840, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The complaint and amendments thereto allege, in substance, that the Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily refusing to hire the following individuals

because of their affiliation with and activities on behalf of the Union: Sherman Soles, William Snyder, Jack Francisco, Craig Andrews, Robert Ryan, Kenneth Lumb, Richard MacGill, and Kevin Radka, and to discourage its employees from engaging in similar activities. The Respondent denies these allegations.

A. The Evidence

The Respondent is an electrical contractor founded in 1984 and based in Phelps, New York, and handles commercial and industrial construction, outside line work, and process controls and computers. The company was started by Robert G. Burns, its president, and his wife. Ray McDermott testified that when he assumed the position of assistant business agent and organizer for the Union in August 1992, he noted that the Respondent had about four projects going within the Union's jurisdictional area and whose employees McDermott might seek to organize for the Union. One project was the Women's Rights Building in Seneca Falls, New York, and the others being three schools, "Cody Stanton, Minors Academy and Frank Knight." In November 1992, McDermott saw an advertisement in the Finger Lakes Times Newspaper soliciting applications from electricians with 3–5 years of industrial and commercial experience. While the advertisement did not name the employer, McDermott recognized the return address as being that of the Respondent.

Regarding this advertisement, the Respondent's president, Robert G. Burns, testified that one of the Respondent's electrical construction projects was a five-story office building in Syracuse, New York, under a joint ventureship arrangement with another contractor, Associated Electric. The joint venture required that each party provide 50 percent of the manpower required for the job. Burns stated that in late October 1992, the Respondent realized that Associated Electric was not providing its adequate share of the manpower required under the joint venture agreement. Since this project had a deadline of the third week in January 1993 for the completion of 3-1/2 floors, the Respondent decided in November 1992 to place an advertisement in the newspaper for electricians in order to have a pool of available manpower should it become necessary to add workers to this project in December 1992 if the problem with Associated Electric continued. In response to the employment advertisement, several individuals, both union and nonunion members completed employment applications with the Respondent.

Subsequently, McDermott informed several unemployed union members about the advertisement so that they could apply, specifically: Horace Daniels, Sherman Soles, William Snyder, Craig Andrews, Jack Francisco, Kenneth Lumb, Robert Ryan, Richard McGill, and Kevin Radka, all electricians who met the minimum qualifications required by the advertisement. McDermott testified that after these union members applied for employment at the Respondent's office, individually or in groups between November 9, 10 and 11, 1992, they then returned to the union hall and reported to him what the Respondent was offering as to wages and benefits, etc. The testimony of Soles, Lumb, Radka, and Daniels was consistent with that of McDermott regarding this.

Sherman Soles testified that he and three other journeyman electricians from the Union (Snyder, Andrews, and Francisco) applied in person at the Respondent's office in response to the advertisement, with McDermott's consent. Soles and perhaps two of the other union members were wearing hats with the Union's name thereon. The Respondent's project manager, Charles Binder, told them that the job paid about $14 per hour and included health and retirement benefits and asked them if they would have a problem with the Union working for a nonunion contractor. After completing a job application they returned to the union hall and advised McDermott as to what had occurred. Having received no communication from the Respondent regarding his application for employment for some time, and concerned in the spring of 1993 about being hired, Soles telephoned the Respondent in July 1993, and was informed by the Respondent's secretary that the Respondent was not currently hiring, but was keeping his employment application on file. Soles was never contacted by the Respondent thereafter.

Soles also testified that he would have accepted employment by the Respondent even as an apprentice if the pay rate was within reason, and that it was not unusual for journeyman electricians to accept lesser-paying jobs when work was hard to obtain. Soles also related that it is not uncommon for an electrical contractor not to hire during the winter months but begin hiring in June or July when more projects usually begin.

Kenneth Lumb testified that he and another union member, Robert Ryan, went to the Respondent's office and completed employment applications after McDermott had informed them about the Respondent's employment advertisement. After asking the Respondent's secretary if she knew where the job locations were, and being told that it might be in Syracuse, New York, they left the Respondent's office. A few days later, McDermott asked Lumb if he had been contacted by the Respondent about a job and Lumb responded that he had not. When Lumb asked McDermott what brought on the inquiry, McDermott told him that the Respondent had contacted Union Business Agent Larry Davis at the union hall asking about Lumb's qualifications and whether they could contact him concerning this job. McDermott testified that Davis advised Binder that Lumb was fully qualified for the position with the Respondent and McDermott documented that Binder told Davis that he would call Lumb, but actually never did so. Lumb added that McDermott told him that the Respondent expressed interest in him because he had worked as a foreman for an electrical contractor named Sullivan Electric.

Lumb related that he returned to the Respondent's office about 1 week later and asked about the status of his employment application. The Respondent's secretary, Brook Robinson,[1] told Lumb that she had no information regarding his application nor whether the Respondent had filled any positions. When the Respondent failed to call Daniels after 30 days,

[1] At the hearing, the General Counsel moved to amend par. V of the complaint to allege as an agent of the Respondent an unnamed individual believed to be a secretary. There is sufficient evidence in the record to show that this individual was Brook Robinson. Robinson was hired in late 1992 to do general clerical work and answer questions on the telephone. In about March 1993 her duties were expanded to include payroll processing and other duties of a comptroller. In *Diehl Equipment Co*., 297 NLRB 504 (1989), the Board held that a receptionist-bookkeeper was an agent of the employer, since the employer had placed her in a position in which she had apparent authority to provide information and to answer questions relative to application forms. In *Benjamin Coal Co*., 294 NLRB 572 (1989), the Board reached a similar finding. For the reasons set forth hereinafter, I grant the General Counsel's motion to amend par. V of the complaint and also find that Robinson was an agent of the Respondent within the meaning of Sec. 2(13) of the Act.

Daniels believed that the Respondent had filled the position. Daniels also testified that McDermott did not say the Respondent had asked Davis for references regarding himself and that Davis had refused to answer the Respondent's questions with respect to his qualifications.

Regarding this, Robert Burns testified that he requested Charles Binder to contact the Union and obtain references for Lumb in order to obtain knowledge as to Lumb's work abilities, reliability, attitude, etc. Binder called the Union's business manager, Davis but Davis, according to Binder, refused to provide any information other than that Lumb was a union member. The Respondent considered this inadequate information on which to consider Lumb for employment. When Lumb visited the Respondent's office thereafter, there was no one in authority there to speak with him and he left. Since Lumb became employed a few weeks later and on and off thereafter, he never checked back for employment with the Respondent.

Kevin Radka testified he and another union member, Richard MacGill went to the Respondent's office to fill out employment applications after seeing the Respondent's newspaper advertisement and with the Union's acquiescence. While filling out the applications, Binder asked them why union members were applying for positions with the Respondent. Radka responded that they were out of work and needed jobs. After completing their application Radka and MacGill left. The Respondent never contacted Radka for employment. Radka added that by about April or June 1993, he realized that the Respondent was not going to hire him although he would have been willing to accept even an apprentice position or similar paying position because he needed a job.

Horace Daniels testified that he went to the Respondent's office in November 1992 to fill out an employment application after McDermott informed him about the Respondent's employment advertisement. Binder, whom Daniels had previously worked with for a nonunion electrical contractor named Carroll & Keavney, and at a time when Daniels was not a union member, told Daniels that there were no positions available at the time. However, Daniels completed the application and submitted his resume, then he left.

A few days later Daniels was called to an interview with Burns. Burns noted that both he and Daniels had worked for a nonunion electrical contractor named R. MacDonald Electric. Daniels testified that he believed that he was being interviewed for a journeyman electrician's position since they discussed Daniels' electrical licenses in Rochester and Syracuse. Daniels stated that Burns was unclear as to the job duties for which he was being interviewed and that Burns mentioned 2–3 jobs. Daniels never disclosed to Burns that he was a union member and in fact the subject of unions never arose. Daniels related that Burns never offered him a position although they discussed wage rates but differed on the amounts for the position of "bucket trucks." Daniels added that he would have taken any job offered to him because he was out of work and at the wage rate mentioned by Burns.

Burns testified that he was seeking to hire Daniels for a lineman position which involves working with high voltages on outside distribution systems and poles and in bucket trucks. Burns told Daniels about a project in Syracuse, New York, and made references to a bucket truck. Burns stated that he would have hired Daniels if they had reached an agreement on a satisfactory wage rate.[2]

Burns testified that within a few weeks after placing the advertisement in the Finger Lakes Times newspaper the Respondent's joint venture partner, Associated Electric, began to provide its share of the required manpower for the Syracuse project, the project deadline was met, and the Respondent began to lay off people in the second or third week of January 1993. Thus the Respondent did not hire any of the individuals who had completed employment applications in November 1992 in response to the newspaper advertisement.

McDermott testified that after the union members had applied for work at the Respondent's office, he continued his organizing activities at the Respondent's worksites and kept notes regarding this. In April or May 1993, McDermott observed employees working for the Respondent whom he was unfamiliar with but was uncertain as to whether these employees were new hires or employees transferred by the Respondent from other projects. Additionally, McDermott noted that the Respondent was bringing in new men on the job through July 20, 1993, "at different times trying to confuse the issue" as to whether these men were new hires or employees transferred from different projects. McDermott related that it was not until August 1993, that he learned with certainty that the Respondent had hired new electricians when he was told by Richard McPhearson, a union organizer for the IBEW, Local 325 in Binghamton, New York, that the Respondent had hired two electricians, Paul Benkowitz and Todd Spencer.

On August 16, 1993, McDermott was contacted by Michael Brown, former project manager for the Respondent, in an effort to join the Union. Thereafter, Brown called McDermott again on August 19, September 15, and October 4, 1993 regarding his interest in becoming a union member. McDermott testified that in or about December 1993, Brown told him that through discussions with other of the Respondent's supervisors while he worked for the Respondent, he knew that the Respondent had no intention of hiring any union applicants. However, Brown gave him no information regarding the identity or timing of any new electricians hired by the Respondent. Moreover, McDermott appeared quite confused regarding the date of this conversation with Brown regarding the year it took place but finally testified that it occurred in December 1993 not 1992. Notwithstanding McDermott's confusion about the date, the evidence indicates that the year was 1993, since McDermott's notes reflect that Brown first spoke to him on August 16, 1993, while inquiring about becoming a union member. McDermott added that he strongly suspected as of February 1, 1993, that the Respondent had hired electricians and believed by the summer of 1993 that the union applicants would not be hired.

Regarding Michael Brown, the General Counsel alleges in the complaint that Brown is a supervisor within the meaning of Section 2(11) of the Act and an agent of the Respondent within the meaning of Section 2(13) of the Act when employed by the Respondent during the relevant period herein. The Respondent denies this allegation.

Section 2(11) of the Act provides:

[2] In his employment application Daniels stated that the desired position was "Electrician/Lineman." Daniels' resume lists as his career objective a position in the field of Journeyman Line Construction and/or Electrical Mechanics. Line work and electrical construction work are different with line work being the higher-paying position.

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

To qualify as a supervisor, it is not necessary that an individual possess all of these powers. Rather possession of any one of them is sufficient to confer statutory status. *NLRB v. Bergen Transfer & Storage Co*., 678 F.2d 679 (7th Cir. 1982). However, consistent with the statutory language and legislative intent, it is well recognized that Section 2(11)'s disjunctive listing of supervisory indicia does not alter the essential conjunctive requirement that a supervisor must exercise independent judgment in performing the enumerated functions. *H.S. Lordships*, 274 NLRB 1167 (1985).

An employee does not become a supervisor merely because he gives some instructions or minor orders to other employees. *NLRB v. Wilson-Crissman Cadillac, Inc*., 659 F.2d 728 (6th Cir. 1981). Nor does an employee become a supervisor because he has greater skills and job responsibilities or more duties than fellow employees. *Federal Compress Warehouse Co. v. NLRB*, 398 F.2d 631 (6th Cir. 1968). Additionally, the existence of independent judgment alone will not suffice for "the decisive question is whether [the employee has] been found to possess authority to use independent judgment with respect to the exercise . . . of some one or more of the specific authorities listed in Section 2(11) of the Act." *Advance Mining Group*, 260 NLRB 486 (1982). Moreover, in connection with the authority to recommend actions, Section 2(11) of the Act requires that the recommendations must be effective.

The burden of proving that an employee is a "supervisor" within the meaning of Section 2(11) of the Act, rests on the party alleging that such status exists. *RAHCO, Inc*., 265 NLRB 235 (1983). I believe that the evidence in this case establishes that Michael Brown was a "supervisor" within the meaning of Section 2(11) of the Act when he worked for the Respondent at the material times relevant herein.

The uncontroverted testimony of Brown shows that he worked for the Respondent from the spring of 1992 through early August 1993. His last position with the Respondent was as project manager. Brown was given a business card,[3] and his duties consisted in coordinating clients, purchasing material, scheduling manpower and working on designs. Brown was paid on a salary basis (about ($40,000 per year) as was Charles Binder, an acknowledged supervisor, although at a slightly lesser salary, while electrician employees are paid by the hour. Brown also received a 5-percent lump-sum profit-sharing bonus at year's end which other supervisor received. Brown had an expense account for meals and mileage which only Burns, Pietrezykowski (Respondent's vice president), and Supervisor Binder had, although electrician employees were sometimes given mileage reimbursement. Brown had his own office with desk, telephone, filing cabinet, lap top computer, and printer as did Burns, Pietrezykowski, and Binder, all acknowledged supervisors.

Brown testified that in the course of his duties as project manager he supervised about 8–10 employees and that he had the authority to discipline employees or effectively recommend such action which it appears he did. Brown recommended wage increases for employees which were effectuated, attended supervisory meetings, and interviewed and recommended the hiring of some employees although Burns had the final say on hiring electricians. Brown also trained employees in their job duties and inspected their work to insure that proper specifications were met.

Brown testified that throughout his employment with the Respondent he suggested that the Respondent hire union electricians but that Burns and Pietrezykowski vehemently opposed this and wanted the Respondent to remain nonunion, maintaining that there never would be a union at the Respondent's facility. According to Brown, Pietrezykowski made it clear to him that the subject of employing union members was closed and should not be raised again. Burns' testimony supported that of Brown somewhat. Burns testified that while Brown had proposed hiring union electricians he opposed this because he had worked as a nonunion electrical contractor for 35 years and wanted to continue this way. Burns also testified that he was opposed to signing a collective-bargaining agreement with a union and that he told his employees that he will never sign a bargaining contract nor be affiliated with a union. However, also in his testimony and that of Binder, they asserted that the Respondent would hire union members when necessary.

Brown related that in November or December 1992, he noticed four men in the Respondent's office filling out employment applications. Binder told Brown that these men were union members applying for work. When Binder informed Burns that union members were seeking employment with the Respondent, Burns replied that "there would be no chance that those gentlemen would be hired."

Burns testified that in the spring or summer of 1993, Burns informed Binder, Brown, and the Respondent's foremen electricians at a meeting that they should watch the employees to prevent their passing company information to union's and outsiders. Burns also issued a letter to employees directing them not to discuss company matters with outsiders on pain of discipline, verbal warning, or direct censure. Burns stated that outsiders included union organizers.

Brown testified that the Respondent's general practice when seeking employees, was to solicit applications through employment advertisements. In the spring or summer 1993 the Respondent received three substantial contracts and Brown suggested that the Respondent advertise for skilled electricians in the Rochester newspapers. Pietrezkowski raised concerns about this for fear of receiving more applications from union members. Thereafter Binder told Brown that the Respondent had placed an advertisement in a Rochester newspaper and that Pietrezykowski had directed Binder to use his personal P.O. box in Geneva, New York in order to disguise the Respondent's identity from the Union to discharge union members' applications and to save the cost of purchasing a Rochester P.O. box.

Brown related that he left the Respondent's employ in the first week in August 1993. On about August 19, 1993, he contacted McDermott about becoming a union member. According to Brown towards the end of October 1993, McDermott told him that the Union was in the process of filing an unfair labor practice charge with the Board against the Respondent and therefore in December 1993, he told McDermott about the discussions he had had with the Respondent's owners and supervi-

[3] Only management and supervisors had business cards.

sors regarding their refusal to hire union members and their antiunion animus.

Burns testified that he received numerous applications regarding the Respondent's November 1992 employment advertisement. Burns admitted that he had knowledge that the alleged discriminatees herein who applied in response to the advertisement were union members. Burns stated that of the union members who applied the Respondent had only considered Lumb for employment. Brown testified that after the employment application appeared in the Finger Lakes Times Newspaper in Geneva, New York, in November 1992, the Respondent hired at least 11 employees. The Respondent hired Scott Wormuth (apprentice) on November 19, 1992, Stephen Fox (apprentice) on January 14, 1993, and James Van Damme (apprentice). Burns explained that if the Respondent does not meet the proper ratio of journeymen to apprentices, it would pay apprentices at the journeyman wage rate under state or Federal requirements.

Regarding journeymen electricians, Burns testified that on January 13, 1993, the Respondent hired Daniel Cochran as a journeyman electrician to also perform service work on machinery as well. Burns did not know Cochran and did not know whether he was referred for the job by anyone. The Respondent hired Paul Benkovitz as a journeyman electrician on July 22, 1993, to work on the Keith Clark Corporation project in Sydney, New York, which ran from December 1992 through about March 1994. Burns stated that Benkovitz had worked for the Respondent previously. Also hired was Todd Spencer in early August 1993, and Scott Kornbau in November or December 1993 as journeymen electricians, both having been referred to the Respondent for employment by former or current employees.

Burns also testified that the Respondent additionally hired several employees as "helpers." On February 13, 1993, the Respondent hired Thomas LaPlant as a helper. Burns stated that LaPlant had previously worked for Associated Electric, a nonunion electrical contractor, and had been recommended for employment by one of the Respondent's foremen. However, Brown testified that LaPlant worked for the Respondent on the Keith Clarke Corporation project in Sydney, New York, performing the duties of a journeyman electrician such as pulling wire and installing conduit and devices.

Burns stated that on April 26, 1993, the Respondent hired Gino Caruso as a helper to work with journeymen electricians installing electrical systems, pipes, wires, and fixtures and devices, having been recommended for the job by his brother who works for the Respondent. However, Brown testified that Gino Caruso was a foreman at Omni Systems in Fairport, New York, and that foremen perform the job duties of journeymen electricians. The Respondent also hired Thomas Zugehoer as a helper on June 26, 1993. According to Burns, Zugehoer had the same job duties as Gino Caruso, working with journeymen electricians installing electrical systems, pipes, wires, and fixtures and devices, all tasks that a journeyman electrician performs. Zugehoer was hired on the basis of an employment application which he submitted on March 5, 1992, but had sought employment with the Respondent frequently thereafter. Burns related that the Respondent had no fixed policy as to the length of time it would keep employment applications but would keep journeymen electrician applications on file in order to hire from them. Burns also testified that the Respondent hired Dave Paddock on July 27, 1993, as a helper, but it appears that Paddock performed merely routine jobs such as cleaning up, carrying tools, and drilling holes through walls.

Moreover, as recorded by McDermott in his notes of November 24, 1993, when he discussed the Union's intent to file unfair labor practice charges against the Respondent with Gene Adams, a union representative in Buffalo, Adams advised him "that even though I'm late in filing the charge, I should go ahead and file it anyway."

B. Analysis and Conclusions

1. Credibility

Based upon a careful analysis of the testimony of the witnesses and the evidence presented herein, my observation of the demeanor of the witnesses, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences which may be drawn from the record as a whole, I tend to credit the account of what occurred as given by the General Counsel's witnesses except for Burns. *Gold Standard Enterprises, Inc*., 234 NLRB 618 (1978); *V & W Castings*, 231 NLRB 912 (1977); *Northridge Knitting Mills, Inc*., 223 NLRB 230 (1976). Their testimony was given in a forthright manner and was generally corroborative and consistent with each others. While McDermott's testimony regarding the date when Brown advised him of the Respondent's antiunion motivation in December 1993 showed initial confusion as to the year it occurred, still I found that this seemed to be actual confusion on his part rather than deceit, and his testimony otherwise seemed reliable and corroborated by other testimony in the record. This is not to say that I found the testimony of Burns totally unbelievable. However, his testimony in some key respects was inconsistent. It is not unusual that based upon the evidence in the record, the testimony of a witness may be credited in part, while other segments thereof are discounted or disbelieved. *Jefferson National Bank*, 240 NLRB 1057 (1979), and cases cited therein. As for Binder's testimony, it appeared inconsistent at times and contradicted in part by that of Burns. Moreover, Brown's testimony as a witness for the General Counsel was supported in part by that given by Burns whose position was assumable to be hostile to that of the General Counsel and the failure by the Respondent to call Pietrezykowski as a witness to refute some of Brown's testimony attributed to him by Brown gives rise to the presumption that his testimony would have been adverse to the Respondent's position. Additionally, based upon the demeanor of the witnesses and other facts in the record, I found the General Counsel's witnesses more credible.

2. The 10(b) period

Section 10(b) of the Act provides "That no complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . ." Section 10(b) is a statute of limitations and is not jurisdictional in nature. It is an affirmative defense which must be pleaded and if not timely raised, is waived. *Federal Management Co.*, 264 NLRB 107 (1982). Moreover, the burden of proving such an affirmative defense rests squarely upon the party asserting it. *Kelly's Private Care Service*, 289 NLRB 30 (1988). While the running of the limitations period can begin only when the unfair labor practice occurs, Section 10(b) is tolled until there is either actual or constructive notice of the alleged unfair labor practice. *Mine*

Workers Local 17, 315 NLRB 1052 (1994); *Pinter Bros*., 263 NLRB 723 (1982). As the Board stated in *Leach Corp.*, 312 NLRB 990, 991 (1993):

> It is also firmly established that the 10(b) period commences only when a party has clear and unequivocal notice of the violation of the Act. E.*g. Desks, Inc*., 295 NLRB 1, 11 (1989). "Further, the burden of showing such clear and unequivocal notice is on the party raising the affirmative defense of Section 10(b)." *Chinese American Planning Council*, 307 NLRB 410 (1992).

The Respondent, who timely raised such a defense in its answer and at the trial alleges in its brief, "Here, the charge was filed November 26, 1993, which means that it was untimely if the events charged occurred and were known to the Union prior to May 27, 1993." The General Counsel asserts as alleged in the complaint that the Union was without knowledge of the Respondent's continuous unfair labor practice until about December 1993 and therefore the filing of the instant charge was in fact timely.

The evidence herein shows that the Union Official McDermott first documented in his log that he saw a new man working for the Respondent on May 26, 1993. McDermott's notes also show that the Union was aware of additional employees being hired by the Respondent, whether as apprentices or journeymen, about which McDermott testified that he did not know if such individuals were new employees or simply transferred from another of the Respondent's projects.[4] I do not believe that mere knowledge of such a fact would necessarily put the Union on "clear and unequivocal notice" that the reason why the Respondent had not hired Union applicants was because of their union affiliation.

The Board in *Brown & Sharpe Mfg. Co*., 312 NLRB 444 (1993), noted that it has consistently applied the doctrine in *Holmberg v. Ambrecht*, 327 U.S. 392, 397 (1946), which holds that if a party "has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered." In addition, the Board held that it agrees with the standard in *Fitzgerald v. Seamans*, 553 F.2d 220, 228 (D.C. Cir. 1977), holding that deliberate concealment of material facts toll the Federal statutes of limitations until a party discovers or with due diligence should have discovered the basis of the lawsuit. There is sufficient evidence in the record to conclude that the Respondent deliberately sought to conceal from the Union its intent to unlawfully not hire any journeyman electrician with Union affiliation and to solicit applications for employment excluding any Union members.

Additionally, even if, on May 26, 1993, the Union had clear and unequivocal notice of the Respondent's unlawful motive for refusing to hire the Union applicants, the charge herein would still be deemed timely filed. *MacDonald's Industrial Products,* 281 NLRB 577 (1986); Section 102.111 of the Board's Rules and Regulations, as amended.

The Respondent further alleges that "in this case the charge, the complaint, and the amended complaint all allege different events . . . the Board does not have 'carte blanche to expand the charge as they might please, or to ignore it altogether.'" *NLRB v. Fant Milling Co*., 360 U.S. 301, 309 (1959); *Reebie Storage & Moving Co*., 313 NLRB 510, 511 (1993). At the hearing the General Counsel moved to amend paragraph VI of the complaint over the objection of the Respondent. For the following reasons I grant the General Counsel's motion to amend paragraph VI of the complaint to change the date on which the Respondent allegedly began to discriminate against the union applicants. Counsel for the General Counsel stated that in drafting the complaint, he relied on the Respondent's assertion, during the investigative stage of this proceeding, that it first hired an individual in April 1993. However, after reviewing the subpoenaed documents the day before the hearing, counsel for the General Counsel learned that the Respondent hired an apprentice (Scott Wormuth) on November 19, 1992.

Under the test enunciated in *Redd-I, Inc*., 290 NLRB 1115 (1988), the amendment sought by the General Counsel was closely related to the timely filed charge. They both involve the same legal theory and the same section of the Act (refusal to hire discriminatees because of their union affiliation in violation of Section 8(a)(3); they both arose from the same sequence of events (Union member's applications submitted in November 1992)); and the Respondent raised the same or similar defenses to this allegation. Moreover, I offered the Respondent additional time to prepare its case after the General Counsel's motion was made, but the Respondent did not seek such additional time. *Children's Mercy Hospital*, 311 NLRB 204 (1993). The Respondent has failed to establish that it would be prejudiced in any way because of the granting of the General Counsel's motion. Also see *Reebie Storage & Moving Co*., supra, in which the Board held that the only requirement is that there be a legally sufficient relationship between the subject matter of the charge and the complaint.

From all of the above, I find and conclude that the Respondent has not met its burden of proof and therefore I find and conclude that the complaint allegations under consideration are not time barred under Section 10(b) of the Act.

3. The alleged 8(a)(1) and (3) violations

The complaint alleges that the Respondent violated Section 8(a)(1) and (3) of the Act by refusing to hire employee-applicants Sherman Soles, Jack Francisco, Robert Ryan, Richard MacGill, William Snyder, Craig Andrews, Kenneth Lumb, and Kevin Radka because they formed, joined, or assisted the Union and engaged in concerted activities and to discourage membership in a labor organization.

Section 8(a)(3) of the Act makes it an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Under the test announced in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), and approved by the Supreme Court in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983), a discharge is violative of the Act only if the employee's protected conduct is a substantial or motivating factor for the employer's action. If the General Counsel carries his burden of proving unlawful motivation, then the burden then shifts to the employer to demonstrate that the same action would have taken place notwithstanding the protected conduct. Also see, *J. Huizinga Cartage Co. v. NLRB*, 941 F.2d 616 (7th Cir. 1991).[5]

[4] It should be noted that the Respondent had instructed its employees not to discuss with "outsiders" the Respondent's business and that this included speaking to union representatives.

[5] An employer cannot simply present a legitimate reason for its actions but must persuade by a preponderance of the evidence that the

However, when an employer's motives for its actions are found to be false, the circumstances may warrant an inference that the true motivation is an unlawful one that the employer desires to conceal. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1960). The motive may be inferred from the total circumstances proved. Moreover, the Board may properly look to circumstantial evidence in determining whether the employer's actions were illegally motivated. *Associacion Hospital del Maestro*, 291 NLRB 198 (1988); *White-Evans Service Co*., 285 NLRB 81 (1987); *NLRB v. O'Hare-Midway Limousine Service, Inc*., 924 F.2d 692 (7th Cir. 1991). That finding may be based on the Board's review of the record as a whole. *ACTIV Industries*, 277 NLRB 356 (1985); *Heath International*, 196 NLRB 318 (1972).

It is well established that it is unlawful for an employer to refuse to hire an applicant because of his union affiliation. *Casey Electric*, 313 NLRB 774 (1994); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941). The Board may prove discrimination in regard to hire as a violation of Section 8(a)(3) of the Act by showing: (1) that the employer is covered by the Act; (2) that the employer at the time of the purportedly illegal conduct was hiring or had concrete plans to hire employees;[6] (3) that antiunion animus contributed to the decision not to consider, interview, or hire an applicant; and (4) that the applicant was a bona fide applicant. See *NLRB v. Transportation Management Corp*., 462 U.S. 393, 401 (1983); *Zachry*, 886 F.2d at 70 (4th Cir. 1989); *J.E. Merit Constructors,* 302 NLRB 301 (1991). The essence of the violation is that the employer discriminated with antiunion animus in regard to its decision whether to hire an employee, for the purpose of discouraging union activity.

It is clear from the evidence that the Respondent was aware that all the alleged discriminatees were union members, i.e., all the union members' applications clearly reflected that they were affiliated with the Union and Burns admitted that the Respondent had knowledge that the alleged discriminatees herein were all union members. Moreover, there is no question that the Respondent harbored antiunion animus. For example, among other instances in the record, whenever the subject of hiring union electricians was raised by Brown, Burns, and Pietrezykowski (Respondent's management) stated that the Respondent was a nonunion electrical contractor and that there would never be a union at the facility; Burns admitted that he has told employees that the Respondent would never sign a collective-bargaining agreementand did not want to be affiliated with a union;[7] in November 1992, in response to Binder advising Burns that the union members had applied for employment with the Respondent, Burns stated "there would be no chance that those gentlemen would be hired"; and the Respondent's attempt in the summer of 1993 to discourage union member electricians from applying for jobs with the Respondent in response to its advertisement in a Rochester newspaper by using Binder's personal P.O. box in Geneva, New York, to disguise the identity of the Respondent as the potential employer.[8]

I therefore find and conclude that the General Counsel has made a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the Respondent's decision to not hire any of the union applicants. *Wright Line*, supra. Under *Wright Line*, the burden now shifts to the Respondent to show that the same action would have taken place notwithstanding the union applicants' union affiliation.

The Respondent contends that it failed to hire any of the union applicants who filed employment applications in response to its November 1992 advertisement in a newspaper because the need for journeymen electricians had dissipated when its partner in a joint venture, Associated Electric, met its commitment to supply its share of such employees at a Syracuse project and the Respondent therefore did not hire anyone at the time. Even if this is true, the Respondent's admitted animus towards the Union and its commitment not to hire union journeymen electricians would violate the Act since the essence of the violation of Section 8(a)(3) of the Act is that the employer discriminated with antianimus in regard to its decision whether to hire an employee, for the purpose of discouraging union activity.

In *KRI Constructors*, 290 NLRB 802, 812 (1988), the Board stated:

> [T]he Act is violated when an employer fails to consider an application for employment for reasons proscribed by the Act and the question of job availability is relevant only with respect to the employer's backpay obligation. [Quoting *Shawnee Industries*, 140 NLRB 1451, 1452-1453 (1963).]
>
> Therefore, "final determination of job availability and possible backpay liability will be properly left to compliance." *Apex Ventilating Co*., 186 NLRB 534 fn. 1 (1970).

The Act speaks unambiguously of discrimination "in regard to hire" and case law has extended the Act's coverage to applicants for a position of employment, since that is the only way discrimination in regard to hire can be neutralized. The above case involved the construction industry as is true in the instant case and the record establishes herein that applications for hire were ordinarily retained for purposes of hire by the Respondent, thus the decision not to hire for reasons proscribed by the Act, even where the immediate need for the journeymen electricians was over, would still constitute a violation of Section 8(a)(3) and (1) of the Act unless the Respondent could establish by a preponderance of the evidence that even if the antiunion animus was a contributing factor in its treatment of the applicants, they would not have been hired because of other legitimate nondiscriminatory reasons. *Wright Line*, supra.

However, the Respondent also asserts that it did not hire the union applicants, since it has a policy of hiring individuals who are referred or recommended by one of its current or previous

same action would have taken place even in the absence of the protected conduct. *T & J Trucking Co*., 316 NLRB 771 (1995); *GSX Corp. v. NLRB*, 918 F.2d 1351 (8th Cir. 1990).

[6] The evidence herein establishes that the Respondent had plans to hire for some positions and certainly in retaining journeyman electrician applications, and concrete plans to hire journeymen electricians for the near or subsequent future.

[7] Based on such a statement, the Respondents' employees could reasonably draw the inference that any attempts by them to seek representation by a union would not only be futile, but would be considered negatively by Burns. *Waco, Inc*., 273 NLRB 746 (1984).

[8] Additionally, in the spring or summer of 1993, Burns held a meeting with Binder, Brown, and the Respondent's foremen electricians wherein he instructed them to watch the other employees to make sure they were not passing on information to "unions and outsiders," and in a letter to employees from Burns, the employees were admonished not to speak to Union organizers about company information upon threat of discipline if they did.

employees. The facts in this case clearly shows that the Respondent's real reason for not hiring the union applicants was because of their union affiliation and its other reasons raised as justification for its conduct appears pretextual, asserted in an effort to conceal its true intent to unlawfully discriminate against them.

The record evidence shows that the Respondent keeps journeyman electrician applications on file for future employment. Burns admitted as such, Robinson told Soles in July 1993 that he did not have to fill out another employment application because the Respondent kept them on file for a number of years, and Burns testified that he had hired Zugehoer on July 26, 1993, based upon an employment application he had submitted on March 5, 1992. Accordingly, despite the Respondent's assertion that in November 1992 it only sought applications for a single project in Syracuse, New York, the record shows that applications are kept on file and are used for future hiring needs.

Moreover, the Respondent hired 11 individuals to perform electrical tasks and other duties on its construction sites. On January 13, 1993, the Respondent hired Cochran, as a journeyman electrician. Burns admitted that he did not know Cochran beforehand nor whether he was referred to the Respondent by anyone. Additionally, while Burns testified that Cochran was hired for his pneumatic piping skills which does not involve electrical tasks, Brown testified that Cochran was a foreman performing journeymen electrician work on one of the Respondent's jobsites.

The Respondent also hired Zugehoer, whom Burns admitted had not been referred or recommended by anyone, but had rather referred himself. Yet Lumb had returned to the Respondent's office to inquire about employment subsequent to his filing an employment application in November 1992, but was not hired. Regarding Lumb, Burns alleged that he was interested in hiring Lumb because he had worked as a foreman for Sullivan Electric in Phelps, New York. Burns instructed Binder to call Davis at the Union to inquire about Lumb's qualifications, notwithstanding that Lumb had not even listed Davis as a reference on his application. While Binder testified that Davis refused to give him any information, McDermott's credited testimony is that Davis told Binder that Lumb was qualified and Binder said he would contact Lumb but never did. The Respondent never attempted to contact any of the references listed by Lumb on his application including Sullivan Electric. Also applicant Robert Ryan, who had listed on his application that he had worked as a foreman for Sullivan Electric and applicant Craig Stevens who also had listed Sullivan Electric as a former employer, were never contacted by the Respondent for employment.

Of additional significance is the fact that Burns interviewed Daniels for a position. Daniels' application for employment did not disclose that he was a union member. Burns testified that he was unaware of this. The firms Daniels listed for prior employment showed that he worked for at least two nonunion electrical contractors whom the Respondent was familiar with, R. MacDonald Electric and Carroll & Keavney. Burns stated that he would have hired Daniels but for their failure to reach agreement on wages. In contrast, the Respondent having admitted knowledge of the discriminatees union membership, did not hire or even interview any of those union applicants.

The Respondent's claim that some of the individuals hired after November 1992 were not journeymen electricians, but were hired as helpers is also suspect. Brown testified that LaPlant, Caruso, and Zugehoer performed work that a journeyman electrician routinely performed, and Cochran, Benkovitz, Spencer, and Kornbau were hired as journeyman electricians after November 1992.

As indicated hereinbefore, it is unlawful for an employer to refuse to hire an applicant because of his union affiliation. *Casey Electric*, supra. In *Fluor Daniel, Inc*., 304 NLRB 970 (1993), the Board, in holding that an employer had discriminatorily and purposely failed either to consider the applications of, or offer employment to, any of the discriminatees therein, because of their union affiliation or sympathies, found it significant that the applicants who were offered employment had weak or nonexistent union affiliations and that many had worked for nonunion employers previously.

The Board noted:

> We find it reasonable to infer that it was not just coincidental that all those applicants who displayed union affiliation were refused employment while those who were hired did not display union affiliation. We conclude that such blatant disparity is sufficient to support a prima facie case of discrimination.

Also in *Fluor Daniel, Inc*., supra, the Board held that the employer therein discriminatorily refused to hire applicants who demonstrated strong union affiliation, the employer's stated motives for rejecting the applicants were false and pretextual. *Lott's Electric Co*., 293 NLRB 297 (1989); *Continental Radiator Corp*., 283 NLRB 234 (1987); *San Angelo Packing Co*., 163 NLRB 842 (1967).

In view of all of the circumstances present in this case, with the reasons advanced by the Respondent to support its failure and refusal to hire the union applicants being found to be pretextual and fraught with unlawful and discriminatory motivation in violation of the Act, I find that the Respondent has not met its burdenunder *Wright Line* of rebutting the General Counsel's prima facie case. It is well settled that when a false reason is advanced "one may infer that there is another reason (an unlawful reason)" for the employer's action. *Shattuck Denn Mining Corp. v. NLRB*, supra. Therefore, I find and conclude that the Respondent violated Section 8(a)(3) and (1) of the Act when it failed and refused to hire the Union applicants herein because of their union affiliation.[9]

IV. THE EFFECTS OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent set forth in section III, above, found to constitute unfair labor practices occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

[9] Also, in *AJS Electric*, 310 NLRB 121 (1993), the Board held that an employer's failure and refusal to hire well-qualified union applicants because of its belief that it would lead to the unionization of its employees was unlawful. The Board held similiarly in *J.L. Phillips Enterprises*, 310 NLRB 11 (1993); *Tyger Construction Co*., 296 NLRB 29 (1989).

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully discriminated against the following job applicants: Sherman Soles, William Snyder, Jack Francisco, Craig Andrews, Robert Ryan, Kenneth Lumb, Richard MacGill, and Kevin Radka, the Respondent shall be ordered to offer them employment to the same or substantially equivalent positions at other projects, and to make them whole for any loss of earnings and other benefits they may have suffered as a result of the Respondent's unlawful discrimination against them, from the date they applied for employment, to the date that the Respondent makes them a valid offer of employment. Such amounts shall be computed in the manner prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), and shall be reduced by any net interim earnings, with interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The recommended Order should be subject to resolution at the compliance proceeding of the issues outlined in *Dean General Contractors, Inc*., 285 NLRB 573 (1987). *Casey Electric,* 313 NLRB 774 (1994). Since the Respondent engaged in hiring discrimination, a make-whole remedy is appropriate, subject to the *Dean General Contractors'* conditions. *Sunland Construction Co*., 309 NLRB 1224 (1992); *Fluor Daniel, Inc*., supra. Consistent with the *Dean General Contractors'* decision, the Respondent will have the opportunity in compliance to show that, under its customary procedures, the eight applicant's positions would not have been transferred to another project, and that no backpay and hiring obligation exists beyond the time when any project as to which discrimination occurred was completed. *Casey Electric,* 313 NLRB 774, 775–776 (1994). Because of the nature of the unfair labor practices found herein, and in order to make effective the interdependent guarantees of Section 7 of the Act, I recommend that the Respondent be ordered to refrain from in any like or related manner abridging any of the rights guaranteed employees by Section 7 of the Act. The Respondent should also be required to post the customary notice.

CONCLUSIONS OF LAW

1. The Respondent, R. G. Burns Electric, Inc., is now and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, International Brotherhood of Electrical Workers, Local 840, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) an (3) of the Act by refusing to consider for employment and/or refusing to employ, because of their union affiliation and activities on behalf of the Union, Sherman Soles, William Snyder, Jack Francisco, Craig Andrews, Robert Ryan, Kenneth Lumb, Richard MacGill, and Kevin Radka.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]